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Supreme Court, U.S.
FILED

No. 07- 07-161 AUG 3 - 2007

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IN THE

Supreme Court of the United States

EMMANUEL RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the good faith exception to the Fourth Amendment's exclusionary rule permits a reviewing court to consider evidence not disclosed to the issuing magistrate; whether the decision of the Eighth Circuit permitting such review constitutes a grave threat to the constitutional right to be free from unreasonable searches and seizures; whether the decision of the Eighth Circuit presents an issue of great public importance; and whether it conflicts with other decisions of the courts of appeals and various states.

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Petitioner Emmanuel Rodriguez respectfully petitions for a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals affirming Petitioner's conviction and sentence before the United States District Court for the Western District of Missouri.

OPINIONS BELOW

The decision of the Eighth Circuit Court of Appeals upholding the Petitioner's conviction and sentence is found in Appendix A and is reported as *United States v. Rodriguez*, 484 F.3d 1006 (8th Cir. 2007). The order of the District Judge affirming the Magistrate's recommendation is found in Appendix B. The order of the United States Magistrate Judge recommending that Petitioner's motion to suppress be denied is found in Appendix C.

JURISDICTION

This Court's jurisdiction to consider decisions of the Courts of Appeals on direct review of a criminal conviction and sentence is found in 28 U.S.C. § 1254(1). The jurisdiction of the Eighth Circuit Court of Appeals to review the judgement and sentence entered in this case is found in 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution: Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. Proceedings Below

A grand jury sitting in the Western District of Missouri charged Mr. Emmanuel Rodriguez with conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A) and 846. Prior to trial, Mr. Rodriguez moved to suppress evidence discovered during the search of two residences. The Magistrate Judge recommended that these motions be denied (App. C). That recommendation was upheld by the District Judge (App. B). Petitioner thereafter went to trial and was convicted. Mr. Rodriguez was subsequently sentenced to 360 months in prison to be followed by a period of five years supervised release. On appeal Petitioner claimed that the lower court erred in denying his motion to suppress. The Eighth Circuit rejected this argument and upheld his conviction and sentence (App. A).

2. Evidence Presented before the District Court

Various witnesses testified that Emmanuel Rodriguez and his brother, Yone Rodriguez, distributed methamphetamine from locations in the Western District of Missouri, including residences in Joplin and Reeds, Missouri. It was Yone's role to finance the purchases of drugs in major cities such as Los Angeles; Emmanuel would arrange for couriers, usually women, to fly to these cities and return with the drugs. Purchasers and couriers testified against Emmanuel in exchange for reduced sentences. Their testimony was corroborated by evidence discovered during two searches conducted by local police based upon warrants issued by a Missouri state judge. Prior to trial, the Petitioner moved to suppress the evidence discovered during the searches on the grounds that the affidavits submitted in

support of the warrants lacked probable cause. In both instances the district court declined to rule upon the sufficiency of the affidavits, finding that even if deficient, the police acted in good faith. On appeal, the Eighth Circuit also declined to rule upon the sufficiency of the affidavits, holding that it was unnecessary to do so where the totality of circumstances, including information known to the officers but not included in the affidavits, establish their good faith (App. A, p. 6a), *United States v. Rodriguez*, 484 F.3d at 1011.

On December 16, 2003 a state search warrant was executed at a residence located in Reeds, Missouri. According to the affidavit filed in support of the search warrant by Detective Randee Kaiser, a reliable confidential informant told the police that Jacqueline Witt was traveling to California to pick up a large quantity of methamphetamine. The police thereafter confirmed that Witt had paid cash for a one way ticket from Kansas City to Burbank, California the day before. Based upon past information, the police believed that Witt would stay in California one to two days before returning. She was subsequently arrested in Tulsa, Oklahoma in possession of 1-2 pounds of methamphetamine. (App. A, 6a).

At the time of her arrest, Witt told the police that she flew to California with Yone Rodriguez, that Yone was carrying $12,000 in cash, and that after they arrived in California, Yone purchased methamphetamine and gave it to Witt to take back to Missouri. Witt also told the police that Emmanuel and Yone lived together at 5165 County Lane 50, in Reeds, Missouri and that on December 15, 2003 she saw Emmanuel sell two ounces of methamphetamine to an unknown person. She also saw numerous guns, a large quantity of methamphetamine, and thousands of dollars in cash inside the residence. The affidavit further stated that three weeks before, Yone was stopped in Los

Angeles for a traffic violation. At that time he was in possession of several thousand dollars and a one way plane ticket to an unknown destination. (App. A, 6a-7a).

At the hearing on the defendant's motion to suppress, Detective Kaiser, over objection of defense counsel, was permitted to testify about information known to the officers but not disclosed in the affidavit. According to Detective Kaiser: (1) three separate sources reported that Emmanuel and Yone had a trailer house in Reeds and used the residence in conjunction with their drug-trafficking activities; (2) officers confirmed the address and location of the Reeds residence by following a map prepared by Witt and through their own independent investigation; (3) Galdino Gallegos had been arrested at the Tulsa airport on December 16 and told the police that Emmanuel had directed Gallegos to pick Witt up at the airport; (4) Witt cooperated with the police following her arrest and made a telephone call to Emmanuel which resulted in Emmanuel coming to the Tulsa airport; and (5) Emmanuel and Yone had been the focus of a three year investigation by the Jasper County Drug Task Force resulting in numerous reports regarding the brothers' methamphetamine distribution activities. (App. A, 7a).

Three days later, December 19, 2003, the police sought another search warrant, this time for a residence in Joplin, Missouri. This affidavit recounted the events surrounding Witt's arrest, her observations of drug-trafficking activity at the Reeds residence, and Emmanuel's statement to the police following his arrest at the Tulsa airport. The affidavit further detailed evidence connecting Emmanuel to the residence including Witt's understanding that Emmanuel's girlfriend Lisa Bateman lived in the area, surveillance showing Emmanuel coming and going from the residence, and

evidence that Bateman paid the water bill. In addition, the affidavit disclosed that a search of the garbage containers outside the residence earlier that day produced items indicating the presence of methamphetamine and reflecting methamphetamine distribution as well as mail addressed to Bateman. (App. A, 8a).

At the suppression hearing, the police testified concerning matters not included within the affidavit including: (1) Emmanuel Rodriquez's written statement to law enforcement following the search of the Reeds residence and (2) information that Emmanuel and Batemen lived at the Joplin residence with their minor child. As noted by the Eighth Circuit, the officers were also familiar with the details of their three year investigation. (App. A, 8a-9a).

On appeal, Petitioner claimed that there was no probable cause to support the search of the residences in Reed and Joplin, Missouri. While there was an abundance of detail demonstrating Ms. Witt's involvement in criminal activity, there was no evidence to establish that she was a reliable witness against anyone else. This claim was not addressed by the Eighth Circuit which held that the good faith exception applied based upon information known to law enforcement but not disclosed to the issuing magistrate.

REASONS FOR GRANTING THE PETITION

I.

THE GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT'S EXCLUSIONARY RULE DOES NOT PERMIT A REVIEWING COURT TO CONSIDER EVIDENCE NOT DISCLOSED TO THE ISSUING MAGISTRATE; THE DECISION OF THE EIGHTH CIRCUIT PERMITTING SUCH REVIEW CONSTITUTES A GRAVE THREAT TO THE CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES; THE DECISION OF THE EIGHTH CIRCUIT THEREFORE PRESENTS AN ISSUE OF GREAT PUBLIC IMPORTANCE; FURTHER IT CONFLICTS WITH OTHER DECISIONS OF THE COURTS OF APPEALS AND VARIOUS STATES

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This right is enforced through the exclusionary rule which holds that evidence seized as the result of an illegal search may not be used by the government in a subsequent criminal prosecution. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

One exception to this exclusionary rule is the good faith exception. *United States v. Leon*, 468 U.S. 897, 922 (1984).

Leon stands for the proposition that courts generally should not render inadmissible evidence obtained by law enforcement officers acting in reasonable reliance upon a search warrant that is ultimately found to be unsupported by probable cause. The good faith exception applies in all but four limited sets of circumstances. *Id.* at 923. The four sets of circumstances are as follows: (1) where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) "where the issuing magistrate wholly abandoned his judicial role"; (3) where the affidavit supporting the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) where, depending upon the circumstances of the particular case, a warrant is "so facially deficient-i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid." *Id.* (internal quotation marks omitted).

The *Leon* good faith exception requires suppression "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926. The purpose of the exclusionary rule is to deter unlawful police misconduct; therefore, when officers engage in "objectively reasonable law enforcement activity" and have acted in good faith when obtaining a search warrant from a judge or magistrate, the *Leon* good faith exception applies. *Id.* at 919-20.

In the instant case, the Eighth Circuit has added an additional gloss to the *Leon* decision, holding that, "When

assessing the good faith of the officers, we look to the totality of the circumstances, including any information known to the officers, but not included in the affidavit," *United States v. Rodriguez*, 484 F.3d 1006, 1011 (8th Cir. 2007)(Appx. C). The court's ruling is at odds with this Court's decision in *Leon* and is premised upon a misreading of this Court's precedent.

The Eighth Circuit relied upon its decision in *United States v. Chambers*, 987 F.2d 1331, 1335 (8th Cir. 1993) which in turn relied upon an earlier decision in *United States v. Martin*, 833 F.2d 752, 756 (8th Cir. 1987). Although *Martin* cited to this Court's decision in *Anderson v. Creighton*, 483 U.S. 635 (1987), *Anderson* did not involve a search warrant. As Judge Gilman pointed out:

> Although the Supreme Court did indeed state in *Anderson* that 'whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.' *id.* at 641, this statement was made in the context of deciding whether qualified immunity protected an officer conducting a warrantless search that was undertaken because of exigent circumstances. Given that no warrant is required for a search undertaken with both probable cause and exigent circumstances, I believe that *Anderson* provides no support for the rule proposed by the government.

United States v. Carpenter, 360 F.3d 591, 600 (6th Cir. 2004).

The decision of the Eighth Circuit is in conflict with that of the Ninth Circuit in *United States v. Hove*, 848 F.2d 137 (9th Cir. 1988). In *Hove*, the Ninth Circuit held:

> The Leon test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. Leon, 468 U.S. at 923, 104 S.Ct. at 3421. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge. "[R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.' " Leon, 468 U.S. at 915, 104 S.Ct. at 3416 (quoting Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)).

Id. at 140. While not deciding this question itself, the Fourth Circuit has recognized that the courts are divided over the question presented herein:

> Courts have divided on this question. Compare United States v. Hove, 848 F.2d 137, 140 (9th Cir.1988) (holding when affidavit itself is totally lacking in indicia of probable cause, the Leon good faith reliance inquiry does not extend to facts known to officers but not included in affidavit); State v. Klosterman, 114 Ohio App.3d 327, 683 N.E.2d 100, 103-05 (1996) (same); and Janis v. Commonwealth, 22 Va.App. 646, 472 S.E.2d 649, 653-55 (1996) (same), with United States v. Marion, 238 F.3d 965, 969 (8th Cir.2001) (holding that when assessing good faith under

> Leon a court looks at the "totality of the circumstances" including information demonstrating probable cause known to the affiant, but not included in his affidavit (internal quotation marks and citation omitted)); United States v. Taxacher, 902 F.2d 867, 871-73 (11th Cir.1990) (same); United States v. Word, No. IP 99-106-CR, 2000 WL 724041, at *13 *15 (S.D.Ind. May 31, 2000), aff'd, No. 00-2688, 2001 WL 13133, 1 Fed.Appx. 491 (7th Cir. Jan.2, 2001) (same); and State v. Edmonson, 257 Neb. 468, 598 N.W.2d 450, 460-62 (1999) (same).

United States v. Bynum, 293 F.3d 192, 199 (4th Cir. 2002).

Whether *Leon* permits a reviewing court to consider what officers claim they knew at the time they applied for a warrant but failed to present to the issuing magistrate is a question of great importance. Such a rule would allow a police officer to present a bare bones affidavit absolutely devoid of probable cause, knowing that at a subsequent hearing he could simply provide the information that was absent from his application. Such a rule would involve the courts in proceedings to tease out what the officers knew at the time the warrant was sought. It would create a dangerous incentive for the police to claim that they knew facts only learned at a later date. It would render the Fourth Amendment a nullity there being no need for a neutral magistrate to determine the reasonableness of a warrant before its execution. Indeed, it would make meaningless the very idea that probable cause must be determined by a neutral and detached magistrate rather than by the police.

CONCLUSION

Review by this Court is necessary to resolve the conflict in the courts. More importantly, review is necessary to prevent the propagation of a procedure that is unworkable, unreliable, and subject to abuse; a procedure that presents the greatest threat to rights heretofore guaranteed by the Fourth Amendment. For all of these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED MAY 7, 2007

UNITED STATES UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 06-3267

United States of America,

Appellee,

v.

Emmanuel Rodriguez,

Appellant.

Submitted: February 12, 2007
Filed: May 7, 2007

Before RILEY, MELLOY, and SHEPHERD, Circuit Judges.

RILEY, Circuit Judge.

Following Emmanuel Rodriguez's (Rodriguez) conviction for conspiracy to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, the district court[1] sentenced Rodriguez to 360 months' imprisonment and 5 years' supervised release. Rodriguez appeals. We affirm.

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1. The Honorable Richard E. Dorr, United States District Judge for the Western District of Missouri.

Appendix A

I. BACKGROUND

Rodriguez and his brother, Yone Rodriguez (Yone), were the focus of a three-year collaborative investigation among several law enforcement agencies based on intelligence indicating the brothers led a methamphetamine distribution conspiracy in southwest Missouri. Authorities arrested Rodriguez on December 16, 2003, upon his arrival at the Tulsa, Oklahoma, airport to pick up Jacquelyn Witt (Witt), a courier who transported methamphetamine for the conspiracy. Witt was cooperating with law enforcement after having been arrested earlier that day at the same location in possession of approximately one kilogram of methamphetamine.

Based on information provided by Witt, a reliable confidential informant (CI), and other conspiracy members, as well as from intelligence reports concerning Rodriguez and Yone, Jasper County (Missouri) Drug Task Force Detective Randee Kaiser (Detective Kaiser) applied for a search warrant for a residence believed to be owned and occupied by Rodriguez and Yone. The warrant, issued and executed on December 16, 2003, authorized a search of property located at 5165 County Lane 50 in Reeds, Jasper County, Missouri (Reeds residence). Upon executing the search warrant, officers found numerous documents bearing the names of Rodriguez and Yone, three firearms, ammunition, digital scales, and other items associated with distribution of controlled substances.

On December 19, 2003, Detective Frank Lundien (Detective Lundien), supervisor of the Jasper County Drug

Task Force, applied for a second search warrant for property located at 3411 South Pearl Street in Joplin, Newton County, Missouri (Joplin residence), which officers believed to be owned by Rodriguez and Lisa Bateman (Bateman), Rodriguez's girlfriend. As the agent responsible for coordinating the investigation of Rodriguez and Yone, Detective Kaiser knew the facts contained in Detective Lundien's affidavit and search warrant application and discussed those facts with other members of the Jasper County Drug Task Force before execution of the warrant. A search of the Joplin residence on December 19 revealed several receipts for purchases and wire transfers by Rodriguez; a bond receipt dated December 17, 2003, showing a cash payment in the amount of $3,100 from Bateman; and over $5,000 in cash.

Rodriguez was indicted for conspiring to distribute more than 500 grams of methamphetamine. Before trial, Rodriguez moved to suppress evidence seized during the execution of the two search warrants. The district court[2] denied Rodriguez's motions to suppress. The case proceeded to trial. Over Rodriguez's objections, the district court allowed the government to introduce evidence of Rodriguez's unexplained wealth[3] and testimony from a law enforcement

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2. The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri, adopting the report and recommendation of the Honorable James C. England, United States Magistrate Judge for the Western District of Missouri.

3. The district court admitted, over Rodriguez's objection, receipts detailing a $3,200 tire purchase and a $430 security system (Cont'd)

officer regarding statements made by Witt during her telephone conversation with Rodriguez. The jury convicted Rodriguez of the conspiracy charge.

Rodriguez's presentence investigation report (PSR) recommended (1) a base offense level of 36 because the offense involved at least five kilograms but less than fifteen kilograms of methamphetamine, *see* U.S.S.G. § 2D1.1(c)(2); (2) a two-level enhancement for possession of a dangerous weapon, *see* U.S.S.G. § 2D1.1(b)(1); and (3) a four-level enhancement for Rodriguez's role in the offense as an organizer or leader, *see* U.S.S.G. § 3B1.1(a). Based on an adjusted offense level of 42 and a criminal history category I, the PSR calculated an advisory Guidelines range of 360 months' to life imprisonment. Rodriguez objected to the PSR's drug quantity determination and to both sentencing enhancements. The district court overruled Rodriguez's objections, sentencing Rodriguez to 360 months' imprisonment and 5 years' supervised release.

Rodriguez appeals, challenging (1) the denial of his suppression motions, (2) the admission of evidence regarding his unexplained wealth, (3) the admission of Witt's statements through the testimony of an officer, and (4) the district court's drug quantity determination and sentencing enhancements.

(Cont'd)
purchase for Rodriguez's Lincoln Navigator, five Western Union receipts for wire transfers by Rodriguez totaling $4,676, and the bond receipt evidencing payment by Bateman in the amount of $3,100.

II. DISCUSSION

A. Denial of Motions to Suppress

Rodriguez contends the district court erred in failing to suppress the evidence seized during searches of the Reeds residence and the Joplin residence because neither search warrant was supported by probable cause. Ordinarily, when reviewing a district court's denial of a suppression motion, we review for clear error the court's factual findings and review de novo whether the Fourth Amendment was violated. *United States v. Bell,* 480 F.3d 860, 863 (8th Cir.2007). However, Rodriguez did not file timely objections to the magistrate judge's report and recommendation denying Rodriguez's motions to suppress. *See* 28 U.S.C. § 636(b)(1). Rodriguez's "failure to file any objections waived his right to de novo review by the district court of any portion of the report and recommendation of the magistrate judge as well as his right to appeal from the findings of fact contained therein." *United States v. Newton,* 259 F.3d 964, 966 (8th Cir.2001) (quoting *Griffini v. Mitchell,* 31 F.3d 690, 692 (8th Cir.1994)). Thus, "we review the court's factual determinations for plain error." *United States v. Brooks,* 285 F.3d 1102, 1105 (8th Cir.2002).

In reviewing the denial of a suppression motion, "we may consider the applicability of the good-faith exception to the exclusionary rule before reviewing the existence of probable cause," because engaging in a probable cause determination is unnecessary if the officers acted in good-faith reliance on a warrant. *United States v. Warford,* 439 F.3d 836, 841 (8th Cir.2006). "Where a search is conducted

pursuant to a warrant, the good faith exception . . . applies, and evidence should not be suppressed due to an absence of probable cause unless the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Id.* (quoting *United States v. Leon,* 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). The officers' reliance on the warrant must be objectively reasonable. *Leon,* 468 U.S. at 919, 104 S.Ct. 3405. When assessing the good faith of the officers, we look to the totality of the circumstances, including any information known to the officers, but not included in the affidavit. *United States v. Chambers,* 987 F.2d 1331, 1335 (8th Cir.1993).

With regard to the Reeds residence search warrant, the affidavit was not based on an anonymous tip. Rather, a CI advised Detective Kaiser that Witt was going to California to pick up a large quantity of methamphetamine for Rodriguez and Yone. Previous information indicated Witt typically stayed in California for one to two days before returning home. Officers confirmed Witt paid cash for a one-way airline ticket and flew to California on December 15, 2003. Detective Kaiser also learned Witt would be flying back from California to Tulsa. Following Witt's arrest on December 16 at the Tulsa airport, Witt corroborated the CI's allegations that Witt flew to California with Yone on December 15, where Yone carried $12,000 cash, purchased methamphetamine, and gave Witt methamphetamine to transport.[4] Witt also stated Rodriguez and Yone lived at 5165

4. At the suppression hearing, Detective Kaiser testified he received several pieces of information before Witt's arrest on December 16 indicating Witt was transporting methamphetamine from California for Rodriguez.

County Lane 50 in Reeds, Missouri. According to Witt, she had been at the Reeds residence on December 15, and observed Rodriguez sell two ounces of methamphetamine to another individual. Witt further observed numerous guns, a large quantity of methamphetamine, and thousands of dollars in cash inside the Reeds residence. Detective Kaiser included all this information in the application for the search warrant.

In addition to the information set forth in the affidavit, Detective Kaiser testified at the suppression hearing that at the time he applied for the search warrant, he was aware of the following: (1) three separate sources reported Rodriguez and Yone had a trailer house in Reeds and used the residence in connection with their drug-trafficking activities; (2) officers confirmed the address and location of the Reeds residence by following a map prepared by Witt and by conducting their own independent investigation; (3) Juan Gonzalez, whose real name is Galdino Gallegos (Gallegos), had been arrested at the Tulsa airport on December 16, 2003, and implicated Rodriguez as having directed Gallegos to pick up Witt at the airport; (4) Witt cooperated with law enforcement following her arrest and placed a controlled telephone call to Rodriguez, resulting in Rodriguez coming to the Tulsa airport; and (5) Rodriguez and Yone had been the focus of a three-year investigation by the Jasper County Drug Task Force and other law enforcement agencies, resulting in numerous reports regarding Rodriguez's and Yone's methamphetamine distribution activities.

Considering the totality of the circumstances, we conclude it was objectively reasonable for the officers to rely

on the validity of the search warrant for the Reeds residence, and the *Leon* exception applies. *See Leon,* 468 U.S. at 922-23, 104 S.Ct. 3405.

With regard to the search warrant for the Joplin residence, Rodriguez asserts no reasonable law enforcement officer would have relied on the search warrant based upon the affidavit submitted in support of the search warrant. We disagree. The affidavit recounted the events occurring three days earlier, including Witt's arrest at the Tulsa airport, Witt's observations of drug-trafficking activity at the Reeds residence, and Rodriguez's written statement to law enforcement following his arrest. According to the affidavit, Witt informed officers Rodriguez's girlfriend, Bateman, lived near 34th Street in Joplin, Bateman's brother advised officers that his sister dated Rodriguez, surveillance conducted on the Joplin residence observed Rodriguez coming and going from the location, and further investigation revealed Bateman paid the waste water bill for the residence. Additionally, the affidavit discussed evidence retrieved from a garbage collection search outside the residence during the early morning hours of December 19-the same day the warrant was executed-indicating the presence of methamphetamine, items consistent with methamphetamine distribution, and discarded mail addressed to Bateman.

The officers' good-faith reliance on the validity of the Joplin residence search warrant was further bolstered, not diminished, by additional facts known to the officers, but not included within the affidavit, including (1) Rodriguez's written statement to law enforcement following the December 16 Reeds residence search, and (2) information Bateman and

Rodriguez lived at the Joplin residence with their minor child. As noted previously, the officers were intimately familiar with the affidavit's facts as well as other information stemming from the extensive, three-year investigation of Rodriguez. Given the officers' knowledge at the time the Joplin residence's search warrant was executed, the officers' reliance on the search warrant's validity was objectively reasonable.

The *Leon* good faith exception applies. *See Leon,* 468 U.S. at 922-23, 104 S.Ct. 3405. We therefore affirm the district court's denial of Rodriguez's motions to suppress.

B. Admission of Evidence of Unexplained Wealth

Rodriguez contends the district court erred in admitting evidence of Rodriguez's unexplained wealth in the absence of evidence showing a lack of other legitimate sources of income. Reviewing the district court's evidentiary ruling for an abuse of discretion, *see United States v. Claybourne,* 415 F.3d 790, 797 (8th Cir.2005) (standard of review), we find none. Unexplained evidence of wealth subsequent to the commission of a crime is relevant and generally admissible in the district court's discretion, even in the absence of direct proof of a defendant's prior impecuniousness. *United States v. Goldenstein,* 456 F.2d 1006, 1011 (8th Cir.1972); *see, e.g., United States v. Pensinger,* 549 F.2d 1150, 1152 (8th Cir.1977), *cited with approval in United States v. Hankins,* 931 F.2d 1256, 1259 (8th Cir.1991). Furthermore, even assuming for the sake of argument evidence of impecuniousness or poverty is a foundational prerequisite to admitting evidence of unexplained wealth, the government

satisfied this requirement by presenting testimony from one of its witnesses that it was a "hassle" for Rodriguez to distribute drugs while at work, thus Rodriguez quit his job in order to distribute drugs from his house or other locations.

C. Admission of Officer Chris Claramunt's Testimony

Rodriguez argues his Sixth Amendment right to confront witnesses against him was violated by the admission of testimony from Officer Chris Claramunt (Officer Claramunt), a narcotics detective with the Tulsa Police Department and a task force officer with the Drug Enforcement Administration, regarding Witt's telephonic statements to Rodriguez. While cooperating with law enforcement, Witt placed a recorded telephone call to Rodriguez in the presence of Officer Claramunt and another officer. Witt testified at trial that during the call, she told Rodriguez "the dope was smaller" and asked whether she would "still get paid the same amount." According to Witt, Rodriguez responded affirmatively and agreed to pick Witt up at the airport.[5] At trial, Officer Claramunt summarized Witt's statements to Rodriguez by testifying, "Basically that [Witt] had arrived at the airport and her ride wasn't there and [she stated] I need a ride. I'm nervous. I've got 2 pounds of meth on me. You [Rodriguez] need to come get me." At the end of the government's direct examination of Officer Claramunt, counsel for Rodriguez objected, arguing the testimony

5. The testimony of Tulsa Police Department Officer Annette Williams, who was present with Officer Claramunt during Witt's conversation with Rodriguez, corroborated Witt's testimony on this topic.

constituted inadmissible hearsay. The district court overruled the objection, holding the testimony was admissible to show Rodriguez's state of mind and to place into context Rodriguez's follow-up statement agreeing to come to the airport.

Because Rodriguez did not raise a Confrontation Clause objection to this testimony at trial, we review his claim for plain error. *See, e.g., United States v. Sharpfish,* 408 F.3d 507, 511 (8th Cir.2005); *United States v. Pirani,* 406 F.3d 543, 550 (8th Cir.) (en banc), *cert. denied,* __ U.S. __, 126 S.Ct. 266, 163 L.Ed.2d 239 (2005) (setting forth plain error standard of review). In *Crawford v. Washington,* 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Regardless whether Witt's statements to Officer Claramunt were "testimonial," they do not implicate Rodriguez's right to confrontation. Officer Claramunt's testimony recounting Witt's telephonic statements was admitted to show Rodriguez's state of mind and to place Rodriguez's statement into context, that is, what caused Rodriguez to arrive at the airport, and the testimony was *not* offered or admitted to prove the truth of the matter asserted. The testimony did not violate Rodriguez's rights under the Confrontation Clause. *See id.* at 59 n. 9, 124 S.Ct. 1354 ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (citing *Tennessee v. Street,* 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) (holding "[t]he

nonhearsay aspect of [the testimony] . . . raises no Confrontation Clause concerns."))); *see, e.g., United States v. Faulkner,* 439 F.3d 1221, 1225-26 (10th Cir.2006) (noting the Supreme Court's decision in *Crawford* makes clear "the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement").

Furthermore, Witt testified at trial and was subject to cross-examination by Rodriguez, thereby satisfying Rodriguez's right to confront witnesses against him. *See Crawford,* 541 U.S. at 60 n. 9, 124 S.Ct. 1354 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [the declarant's] prior testimonial statements"). Although Witt's testimony differed slightly from Officer Claramunt's, Rodriguez was entitled to argue those inconsistencies to the jury, and such inconsistencies go to the weight of the evidence, not its admissibility. Consequently, Rodriguez's Confrontation Clause challenge lacks merit.

D. Sentencing Issues

Finally, Rodriguez challenges the district court's drug quantity determination and sentencing enhancements. We review de novo the district court's application of the Sentencing Guidelines and review for clear error its factual findings.[6] *United States v. Mathijssen,* 406 F.3d 496, 498 (8th Cir.2005).

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6. Rodriguez argues the district court erred in rendering its sentencing determinations by using a preponderance of the evidence (Cont'd)

Appendix A

1. Drug Quantity Determination

"In order to attribute a quantity of drugs to a defendant, the sentencing court is required to find by a preponderance of the evidence that the activity involving those drugs was in furtherance of the conspiracy and either known to that defendant or reasonably foreseeable to him." *United States v. Morin,* 437 F.3d 777, 782 (8th Cir.2006) (quoting *United States v. Mickelson,* 378 F.3d 810, 822 (8th Cir.2004)). In a drug conspiracy case, "the district court may consider amounts from drug transactions in which the defendant was not directly involved if those dealings were part of the same course of conduct or scheme." *Id.*

In this case, sufficient evidence supports the district court's determination that Rodriguez was involved in a conspiracy and Rodriguez knew, or it was reasonably foreseeable to him, the conspiracy involved at least five kilograms, but less than fifteen kilograms of methamphetamine. Witt testified she and another individual routinely transported methamphetamine from California;

(Cont'd)

standard, asserting the Supreme Court ultimately will determine a defendant's culpability must be established by clear and convincing evidence instead of by the preponderance standard. Under the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), judicial fact-finding based on a preponderance of the evidence standard is permitted, so long as the Guidelines are applied in an advisory manner. *See United States v. Thorpe,* 447 F.3d 565, 569 (8th Cir.2006). Because the district court so applied the advisory Guidelines, we reject Rodriguez's invitation to remand this case for resentencing under a stricter burden of proof.

Atlanta, Georgia; and Texas. Flight records indicated Witt, Yone, and another individual made more than ten trips to these locations in 2002 and 2003. Witt also testified she brought back approximately one kilogram on each trip. Such testimony is borne out by Witt's arrest on December 16, 2003, while in possession of approximately one kilogram of methamphetamine after returning from California. The record also contains testimony from several co-conspirators corroborating the amount of methamphetamine involved in the conspiracy. Thus, the district court did not clearly err in calculating the drug quantity attributable to Rodriguez and setting Rodriguez's base offense level at 36.

2. Aggravated Role Enhancement

Section 3B1.1(a) of the Sentencing Guidelines authorizes a four-level enhancement "[i]f the defendant was an organizer or a leader of a criminal activity." In determining whether to impose the enhancement, a sentencing court should consider the defendant's

> exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1 cmt. n. 4.

Considering these factors, we find sufficient evidence to support Rodriguez's role enhancement. At trial, Witt testified Rodriguez provided $20,000 to $60,000 cash for the drug-buying trips, each time giving Witt money for her airline ticket and for the actual drug purchase. Rodriguez also coordinated Witt's transportation to and from the airport, paid Witt for delivering drugs to him after each trip, and once paid Witt's $494 cab fare when no one picked Witt up from the airport. Rodriguez also instructed Witt about what to do when Yone was detained at a California airport.

Additionally, cooperating witness Sharon Robbins (Robbins) described Rodriguez as "the top dog," and testified that in September 2003, Rodriguez arrived with a gun to enforce a drug deal gone awry and to discern the location of his money and drugs. Gallegos, another cooperating witness, testified Rodriguez received the cash for drug sales, even when others conducted transactions for him. Gallegos described Yone's and Rodriguez's joint leadership positions, testifying Yone "was in charge of getting the dope," and Rodriguez "was in charge of selling it." Cooperating witness David Reyes corroborated this testimony by describing Rodriguez's role as picking up drug deliveries from the airport, weighing the drugs and distributing them to others, and making sure Rodriguez received the money. Such testimony demonstrates Rodriguez exercised considerable decision-making authority and participated extensively in planning and organizing the drug conspiracy's activity and the actions of its members.

Rodriguez argues the conspiracy's true leader was Yone, and that Rodriguez, like everyone else, took orders from

Yone. Rodriguez's characterization of his and Yone's respective roles is unconvincing. Furthermore, for purposes of § 3B1.1(a), the defendant need not be the sole organizer or leader of a criminal organization; rather, there can be more than one organizer or leader. *United States v. Zimmer,* 299 F.3d 710, 719 (8th Cir.2002); *see, e.g., United States v. Placensia,* 352 F.3d 1157, 1166 (8th Cir.2003). Based on the record before us, even if Yone also was an organizer or leader, the district court did not clearly err in applying the four-level enhancement for Rodriguez's role in the drug conspiracy.

3. Weapon Enhancement

Section 2D1.1(b)(1) of the Sentencing Guidelines authorizes a two-level enhancement if the defendant possessed a dangerous weapon, including a firearm, in connection with a drug offense "unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1 cmt. n. 3; *see, e.g., Morin,* 437 F.3d at 781. At trial, the government presented evidence Rodriguez (1) arrived armed at another individual's residence to enforce a drug deal, (2) possessed firearms at various drug distribution locations, (3) asked others to bring guns to trade for drugs, and (4) told others he wanted guns to protect his drug operation. Officers also seized three firearms and several rounds of ammunition from the Reeds residence during the December 16, 2003, search. Given this evidence, the district court did not clearly err in imposing the two-level weapon enhancement.

III. CONCLUSION

For these reasons, we affirm Rodriguez's conviction and sentence.

APPENDIX B — ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHWESTERN DIVISION FILED OCTOBER 3, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHWESTERN DIVISION

Case No. 04-05033-02-CR-SW-ODS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMMANUEL RODRIGUEZ,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

On August 31, 2005, the Honorable James C. England, United States Magistrate Judge for the Western District of Missouri, issued his Report and Recommendation recommending that Defendant's Motion to Suppress be denied. Neither party filed objections to the Report and Recommendation, and the time for doing so has passed. 28 U.S.C. § 636(b)(1)(C); Local Rule 74.1(a)(2).

Appendix B

Accordingly, Judge England's Report and Recommendation is adopted as the Order of the Court, and Defendant's Motion to Suppress is denied.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: October 3, 2005

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHWESTERN DIVISION FILED SEPTEMBER 1, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHWESTERN DIVISION

Criminal Action
No. 04-05033-02-CR-SW-ODS

UNITED STATES OF AMERICA,

Plaintiff,

v.

EMMANUEL RODRIGUEZ,

Defendant.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Defendant has filed two Motions to Suppress Evidence, in which he asserts that evidence seized as a result of a search at 5165 County Lane 50, Reeds, Missouri and as a result of a search at 3411 S. Pearl, Joplin, Missouri, should be suppressed. The United States filed its response. The matter was set for an evidentiary hearing, which was held before the undersigned on June 21, 2005. The defendant was present

with counsel, Frank A. Rubino, and the United States was represented by Robyn McKee, Assistant United States Attorney.

Defendant contends that, in the case of the warrant executed at 5165 County Lane 50, Reeds, Missouri, the reliable confidential informant was, in fact, not reliable, and that her statements regarding drugs, money, and guns located at that address were not corroborated by any of the officers. Regarding the search warrant issued for 3411 South Pearl, Joplin, Missouri, defendant contends that the information in the affidavit was wholly insufficient to establish probable cause because the only connection between the residence and methamphetamine was a scale found in the trash that had methamphetamine residue on it, and the only connection with defendant is that it is claimed that he had been observed going there. Further, defendant contends that there was an insufficient nexus to believe that drug activity, described by Jeff Bateman eight months before, was sufficient to tie it to the residence at 3411 S. Pearl. Finally, defendant asserts that the affidavit was not sworn to before the issuing judge, and therefore, that there is a large technical defect in this affidavit.

It is the government's position that, from the four corners of the affidavits in this case, it is clear that sufficient probable cause existed to believe that controlled substances and related contraband would be located at both residences. Additionally, it is contended that, even if probable cause were lacking, the good faith exception enunciated in *United States v. Leon,* 468 U.S. 897 (1984), should apply.

Appendix C

The government called Randee Kaiser of the Jasper County Drug Task Force. He is the local case agent in connection with this investigation, and is employed by the Carthage Police Department. On December 16, 2003, Officer Kaiser applied for a search warrant for the 5165 County Lane 50 address. He prepared the affidavit, and appeared personally before Associate Circuit Judge Richard Copeland. The Judge signed the search warrant that day. The officer believed it to be valid prior to executing it on the residence. In the affidavit, he set forth a summary of the facts known to him at the time. He did not include every detail of the investigation on Yone and Emmanuel Rodriguez, which had been ongoing for at least three years prior to this time. Rather, he included those facts that he believed were sufficient to establish probable cause. One of the areas of information that was known to him at the time that was not included in the affidavit was regarding Jacqueline Witt. Officer Kaiser testified that a reliable confidential informant had advised him about Jacqueline Witt. The informant said Ms. Witt was transporting methamphetamine for Yone Rodriguez. The confidential informant also verified previous information Officer Kaiser had received from other informants that Ms. Witt made short trips to California and transported methamphetamine back to Missouri. Ms. Witt was arrested at the Tulsa Airport on December 16, 2003, and gave a statement to the Tulsa authorities. Officer Kaiser referred to this statement in his affidavit. He also knew that she called Emmanuel Rodriguez from the airport; that defendant went to Tulsa pursuant to the phone call; and he was subsequently detained. He was aware that defendant had been questioned, but was not aware of what he said at that time. The following day, he learned the contents of the statement, prior to the

search warrant being executed. He was also aware that Juan Gonzalez had been detained at the airport. Mr. Gonzalez stated that defendant told him to pick up Ms. Witt from the airport. He had previously dropped her off at the airport. Mr. Gonzalez advised that he went at defendant's direction. It was Officer Kaiser's testimony that he had three separate pieces of information regarding Ms. Witt transporting methamphetamine from California for defendant. Some of this was sketchy information. Other information was more specific, and included the period of time she would stay and what she was transporting the drugs for. The officer had received information from an informant that both defendant and Yone had a trailer in Reeds. Ms. Witt drew a map of the location, and the authorities in Tulsa faxed it to him. The officer testified that he took great pains to make sure he had the right location and the right address. They cross-referenced the address, which checked back to defendant's aunt. The officers locally went to the residence, by following Ms. Witt's map, and saw vehicles there. They checked the license plates from the vehicles, and one of them checked back to defendant. Officer Kaiser also included information in the affidavit that Yone Rodriguez had been stopped in California with several thousand dollars of currency and a one-way plane ticket. In his mind, this information corroborated what Ms. Witt had said about Yone Rodriguez making frequent trips to California with her for the purpose of purchasing methamphetamine and transporting it back to Missouri.

Regarding the second search warrant that was served on 3411 South Pearl in Joplin, the affiant was Frank Lundien. Officer Kaiser was aware of all the facts that lead up to that search warrant, and was present when it was executed. He

testified that Officer Lundien is the supervisor of the Jasper County Drug Task Force. He applied for the search warrant on December 19th. Officer Lundien faxed all the information to the Newton County Prosecutor. His affidavit was notarized prior to submitting it to the prosecutor. Based on Officer Kaiser's knowledge, the signed copies of the search warrant, the application, and the affidavit were faxed back to their office. This is standard procedure when attaining a search warrant from the Newton County judge. The search warrant was signed by Judge John LePage, who is a McDonald County Judge, sitting by designation in Newton County. At the time they executed the search warrant, he believed it was valid because the judge had signed it, and because he reviewed the facts and believed there were sufficient facts to establish probable cause. The affidavit indicates that there was a trash run at the Pearl Street residence and Wal-Mart bags with holes cut in them were found. Officer Kaiser stated that individuals who package and distribute methamphetamine frequently cut corners out of the bags and cut a circle in the bag to package small amounts of methamphetamine. This method is consistent with purchases he has made as an undercover officer. During the trash run, he also found scales that tested positive for methamphetamine, and an AT&T bill in Ms. Bateman's name, which listed three calls to California. This trash run was conducted the day the search warrant was obtained. Prior to the search, he and other officers had targeted this address. They had received information from an informant that Lisa Bateman was defendant's girlfriend, and that she and defendant were living at the Pearl Street address with their child. Additionally, the officers had seen defendant there through random day and night surveillance over the previous

month. The information they had did not necessarily indicate that methamphetamine was being produced at the Pearl Street address, but that defendant was distributing methamphetamine. This information came from Jeffrey Bateman, who is Lisa Bateman's brother. The statement about defendant going to Tulsa and making a written statement was not available when the first search warrant was sought, but was available and included in the affidavit for the search warrant sought on the 19th.

On cross examination, Officer Kaiser testified that he went before the judge to obtain the search warrant on the 16th for the trailer. He swore to it before the judge. The information the judge had was limited to the four corners of the document. Regarding the reliable informant, the individual advised him personally about Jacqueline Witt. The officer agreed that the confidential informant did not tell him that he or she had seen drugs at the Reeds Trailer. He did have information that Ms. Witt said she was at the Reeds Trailer before she went to California, and that she saw guns and drugs. Ms. Witt stated that defendant had sold drugs there. The affidavit indicated that defendant and Yone lived there. The information they had obtained from the confidential informant about Ms. Witt was corroborated by the officers. Regarding the statement in the affidavit that the confidential informant was "reliable," the officer stated that this is someone with a good track record with the officers. The informant did not provide any information about defendant except that Ms. Witt told the informant that she was going to California for defendant. Regarding the information from Ms. Witt, the officer agreed that she was not in the category of a reliable informant. Officer Kaiser

testified that Ms. Witt cooperated with the officers in Tulsa by providing information, which was also incriminating to her. He did not advise her that her cooperation would be helpful to her and would be communicated to the judge or to prosecutors. Regarding her statement that defendant and Yone lived at the Reeds trailer, the officers already had information that they were staying at a trailer in Reeds. Although he also had information about defendant living at the Pearl Street address, through his experience, it is not uncommon for individuals in such circumstances to have multiple addresses. He accepted that defendant stayed at the trailer with Yone, and stayed at the house with his girlfriend and their child. When they went to the trailer, defendant was not there. The officer testified, however, that they found evidence that defendant had been living or staying there, because there was mail with his name on it. Ms. Witt said she had been there on the 15th, but he was not able to corroborate this. He did not corroborate that she saw a drug sale there, or that she saw guns, drugs, and cash, but the information was consistent with previously received information about guns, methamphetamine, and cash at that residence. To the best of his recollection, the confidential informant never said that he or she had been in the Reeds trailer. He stated that the 911 call indicated that the address was listed to defendant's aunt.

Regarding the search warrant for the Pearl Street address, Officer Kaiser acknowledged that Officer Lundien prepared the affidavit. Officer Kaiser was in the office when he prepared it. He knew that Officer Lundien did not take the affidavit to the judge, and he was not aware of any communication that the judge had with the officer. The signature of the officer was notarized. Officer Kaiser admitted

that no one had told them specifically that drugs were located at the Pearl Street address. But, because they found the scales with methamphetamine residue, he believed this indicated there had been drugs at the house.

The law is clear that a warrant is supported by probable cause if, "given all the circumstances set forth in the affidavit . . . , including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability" that contraband or evidence of a crime will be found in the place to be searched. *United States v. Edmiston,* 46 F.3d 786, 789 (8th Cir. 1995), quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983). Affidavits should be read in a "common-sense and realistic fashion" and judges must make a practical decision based on the totality of the circumstances. *United States v. Gladney,* 48 F.3d 309, 312 (8th Cir. 1995) (citation omitted). In determining for suppression purposes the validity of a warrant, the court must determine whether there was a "substantial basis" for the probable cause determination. Gates, 462 U.S. at 238. Probable cause may be based on hearsay from a reliable source. *Id.* at 244-45. The reliability of a confidential informant may be established by the individual's track record of having provided reliable information, or through corroboration by independent evidence. *U.S. v. Fulgham,* 143 F.3d 399, 401 (8th Cir. 1998) (citation omitted). "When we review the sufficiency of an affidavit supporting a search warrant, great deference is accorded the issuing judicial officer." *Id.* at 400-01. In this case, the affidavit in support of the first search warrant for 5165 County Lane 50, Reeds, Missouri, included information that there had been a three-year long investigation by the Jasper County Drug Task Force and other

agencies, focused on Yone Rodriguez and defendant. The officers had intelligence reports that indicated that they frequently distributed methamphetamine. A reliable confidential informant told Officer Kaiser, the affiant, that Jacqueline Witt was going to California to pick up a large amount of methamphetamine. The officer had information that indicated that Ms. Witt only stayed in California a day or two and then flew back. It was confirmed that she bought a one-way ticket and flew from Kansas City to Burbank the morning of December 15, 2003. The officers had information that she would be flying back to Tulsa, Oklahoma. They stopped her at the airport there, and found her in possession of one to two pounds of methamphetamine. Ms. Witt told the agents that she had gone to California with Yone Rodriguez on December 15, that he had $12,000 in cash, that he bought the methamphetamine, and that he gave it to her to transport. She also told the agents that Yone Rodriguez and defendant lived together at the address in Reeds, and that she had been there on the 15th. Ms. Witt told the agents that she had seen defendant sell two ounces of methamphetamine to someone on that date, and that she had seen numerous guns, a large quantity of methamphetamine, and cash there. Officer Kaiser also included the information that Yone Rodriguez had been stopped in California three weeks earlier and was found with several thousands of dollars of cash and a one-way plane ticket to an unknown destination.

Officer Kaiser testified at the hearing that the confidential informant had provided reliable information in the past, and that the information regarding Ms. Witt making frequent trips to California was corroborated by several separate sources. Additionally, he testified that Ms. Witt drew a map to the

trailer, and that the officers confirmed the address and location through their own investigation. Further, in regards to the fact that Ms. Witt had not previously provided any information, he testified that she made incriminating statements and that she was not promised any favors in exchange for the information she provided. Although the officer admitted that he did not corroborate the information regarding Ms. Witt having been at the residence on the night of the 15th, he had previously received information about guns, methamphetamine, and cash at that residence. After a full review of the affidavit in support of the application for the search warrant, the Court finds that, based on the totality of the circumstances, including the statements from a confidential informant who had proven reliable in the past, corroboration of information received from several sources, and the officers' own investigation, probable cause existed to support the issuance of the first search warrant.

Even if that were not the case, however, the Court is of the opinion that the good faith exception enunciated in *United States v. Leon,* 468 U.S. 897, 922-23 (1984), would apply. When making a good faith assessment, the Court must examine the totality of the circumstances, including what the officer knew but did not include in his affidavit. *United States v. Chambers,* 987 F.2d 1331, 1335 (8th Cir. 1993). Having reviewed the record as a whole, with the benefit of the additional information adduced at the hearing, it is clear that the officers reasonably relied on the validity of the warrant. The officers had available to them the information set forth in the affidavit, as well as the additional information about which Officer Kaiser testified at the hearing. A careful review of the evidence establishes that the officers had an

objective, good faith belief that the warrant was valid and based upon probable cause. Accordingly, it will be recommended that the motion to suppress the evidence seized as a result of the search warrant issued on December 16, 2005, should be denied.

In terms of the second search warrant, for the premises at 3411 S. Pearl, Joplin, Missouri, the affidavit relies on the information obtained from Officer Kaiser regarding Ms. Witt. It contains the results of the search warrant that was executed on December 16th. The affidavit also includes additional information regarding the fact that Ms. Witt called defendant from the Tulsa Airport and told him she needed a ride back to Joplin. Defendant went to Tulsa, and was contacted by law enforcement officers there. He told them that Yone Rodriguez, his brother, had the drug connection in California. Ms. Witt stated that defendant had a girlfriend named Lisa Bateman, who lived in the area of 34th Street in Joplin, west of Main. The affidavit also provides that previously, on February 26, 2003, a Joplin Police Officer, Larry Stout, interviewed Jeff Bateman, Lisa's brother. Mr. Bateman, who was in possession of a large amount of methamphetamine, said that his sister dated defendant, and that he got his methamphetamine from both defendant and his brother on a regular basis. The affidavit indicates that the officers conducted surveillance on the 3411 Pearl Street address and observed defendant coming and going from this location. The affiant, Officer Frank Lundien, confirmed that Lisa Bateman paid the waste water bill. On December 19, 2003, Officer Lundien examined the trash on the curb at that location and found evidence of methamphetamine packaging. He also located a set of scales, which had methamphetamine residue.

Additionally, the trash contained mail addressed to Lisa Bateman, and a telephone bill with three calls made to California. Regarding the information from Jeff Bateman, although it was received in February, the officers independently corroborated his statement that his sister lived at that address. They also confirmed, through random surveillance, that defendant came and went from the residence on Pearl Street, which would support Mr. Bateman's statement that his sister lived with defendant. Additionally, Mr. Bateman was found with a large amount of methamphetamine, which he said he obtained from defendant and his brother. Ms. Witt also had told the agents in Tulsa that Lisa Bateman was defendant's girlfriend. Further, the trash run indicated that, at the least, methamphetamine was being weighed and packaged from those premises. Accordingly, based on the totality of the circumstances, the Court finds that probable cause existed to support the second search warrant.

Regarding defendant's additional challenge to the search warrant, after the hearing in this case, defendant filed a Supplemental Memorandum of Law to Previously Filed Motion to Suppress. Defendant asserts that during the testimony of Officer Kaiser, it was learned that investigator Frank Lundien did not swear to the affidavit in front of the judge. Defendant argues that, on the affidavit for the search warrant for 3411 South Pearl, Officer Lundien's signature is at the bottom, and directly below that it states, "subscribed and sworn to me this blank date of December, '03' with a signature line for judge of the Circuit Court." [Defendant's Supplemental Memorandum at 3]. Defendant argues that although it was obviously anticipated that the affiant would

appear before the judge and swear to the affidavit, that did not occur. He contends that we do not know whether the notary "simply attested that that was Frank Lundien's signature or actually swore Frank Lundien." [*Id.*].

The government has replied to defendant's Memorandum. It is represented to the Court that Officer Lundien is prepared to testify, should it be deemed necessary, that he did swear to the truth and accuracy of the information contained in his affidavit before the notary public. The government asserts, however, that the additional testimony is not necessary because it is clear from a review of the affidavit that Officer Lundien intended to be under oath at the time of the presentation of the application and supporting affidavit to the judge. Further, it is contended that even if the oath administered by the notary public was somehow insufficient, the officers relied in good faith on the validity of the warrant.

A review of the holdings in *United States v. Workcuff,* 250 F. Supp.2d 1160, 1188-90 (W.D.Mo. 2003), and *United States v. Brooks,* 285 F.3d 1102, 1105 (8th Cir. 2002), indicates that the proper inquiry for the Court is whether the verifying officer "intended to be under oath because his statements and actions manifested such an intention." *Workcuff,* 250 F. Supp.2d at 1190.

The Court has reviewed the testimony of Officer Kaiser, who was present when Officer Lundien prepared the affidavit. He testified that Officer Lundien, who is the supervisor of the Jasper County Drug Task Force, faxed the affidavit, the application, and the search warrant to Jake Skouby, the

Newton County Prosecutor. It was his testimony that Officer Lundien had the affidavit notarized prior to submitting it to Mr. Skouby. Larry Stout, Notary Public, notarized Officer Lundien's signature, but Officer Kaiser did not know if Mr. Stout actually swore Officer Lundien, or merely attested to his signature. The officers were faxed back the application, affidavit, and search warrant signed by the judge. It was Officer Kaiser's statement that this method is standard procedure when obtaining a search warrant from Newton County, which is some distance from the Jasper County Drug Task Force Office. At the time they executed the search warrant, he believed it was valid because the judge had signed it, and because he reviewed the facts and believed there were sufficient facts to establish probable cause.

The Court has the government's representation that Officer Lundien, if called, would testify that he did swear to the truth and accuracy of the information contained in his affidavit before the notary public. Further, the first line of the affidavit states that, "[t]he undersigned being duly sworn states to the Court. . . ." [Government's Exhibit B]. At the conclusion of the affidavit, the line appears, "Subscribed and sworn to before me this ___ day of December 2003." It is signed and dated December 19, 2003, by Larry Stout, Notary Public. The application is signed by the Prosecuting Attorney, who indicates that "being duly sworn," he makes application for a search warrant. At the bottom of the application, it is stated, "Subscribed and sworn to before me this 19th day December 2003, and is signed by the Circuit Court Judge. The search warrant itself states that the application is "duly verified by oath," and is signed by the judge. It can be concluded, accordingly, that Officer Lundien's intent was to

be under oath at the time of the presentation of the affidavit and application to the issuing judge for the search warrant for 3411 S. Pearl, and that the search warrant met the constitutional requirement that it be supported by an oath or affirmation.

Even if this were not the case, however, the Court agrees that the warrant should not be suppressed because the officers acted with a good faith reliance on the validity of the warrant when they served it. According to the testimony of Officer Kaiser, the procedure relied upon in faxing the affidavit and the application to the prosecuting attorney in Newton County was a standard practice, given the distance between the Task Force Office and the Newton County Prosecutor's office. He also testified that he believed the search warrant was valid because the judge had signed it, and because he reviewed the facts and believed there were sufficient facts to establish probable cause. It is clear that officers relied in good faith that the warrant was valid and based upon probable cause, and the *Leon* exception would therefore apply. Accordingly, it will be recommended that defendant's motion to suppress the evidence seized as a result of the search warrant executed on December 19, 2003, be denied.

For the foregoing reasons, it is, pursuant to the governing law and in accordance with Local Rule 72.1 of the United States District Court for the Western District of Missouri,

Appendix C

RECOMMENDED that defendant's Motions to Suppress Evidence be denied.

/s/ James C. England
JAMES C. ENGLAND
United States Magistrate Judge

Date: 9/1/05